

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

1 IN THE SENATE

2

SENATE BILL NO. 497

3

IN THE LEGISLATURE OF THE STATE OF ALASKA

4

SIXTEENTH LEGISLATURE - SECOND SESSION

5

A BILL

6

For an Act entitled: "An Act relating to the reform of certain environmental conservation laws and providing administrative penalties for their violation; amending Rule 82, Alaska Rules of Civil Procedure; and providing for an effective date."

7

8

9

10

11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

12 \* Section 1. AS 46.03.020(6) is amended to read:

13

(6) with the consent of the owner or occupier, at

14

reasonable times enter and inspect [WITH THE CONSENT OF THE OWNER OR

15

OCCUPIER] any property or premises, and copy records, to investigate

16

either actual or suspected sources of pollution or contamination or to

17

ascertain compliance or noncompliance with this chapter, AS 46.04,

18

AS 46.09, or with a regulation, order of the department, permit,

19

approval, or certificate issued under this chapter, AS 46.04, or

20

AS 46.09; the department shall maintain as confidential [A REGULATION

21

WHICH MAY BE ADOPTED UNDER AS 46.03.020 - 46.03.040;] information

22

relating to secret processes or methods of manufacture discovered

23

during investigations [IS CONFIDENTIAL];

24

\* Sec. 2. AS 46.03.020 is amended by adding a new paragraph to read:

25

14) at reasonable times enter and inspect the property or

26

premises of a pervasively regulated facility, and copy records, to

27

investigate either actual or suspected sources of pollution or

28

contamination or to ascertain compliance or noncompliance with this

29

chapter, AS 46.04, AS 46.09, or with a regulation, order of the

1 department, permit, approval, or certificate issued under this  
2 chapter, AS 46.04, or AS 46.09; the department shall maintain  
3 information relating to secret processes or methods of manufacture  
4 discovered during investigations as confidential.

5 \* Sec. 3. AS 46.03.170(f) is amended to read:

6 (f) A variance or renewal granted under this section may not be  
7 construed to prevent or limit the application of [THE EMERGENCY]  
8 orders of the commissioner issued under AS 46.03.820 or 46.03.850.

9 \* Sec. 4. AS 46.03 is amended by adding a new section to read:

10 Sec. 46.03.761. ADMINISTRATIVE PENALTIES FOR POLLUTION. (a)  
11 The department may assess an administrative penalty against a person  
12 who violates or causes or permits to be violated a provision of this  
13 chapter, AS 46.04, AS 46.09, or a regulation, order of the department,  
14 permit, approval, or certificate issued under this chapter, AS 46.04,  
15 or AS 46.09.

16 (b) The department may adopt regulations prescribing the  
17 administrative procedures authorized under this section. The  
18 provisions of AS 44.62 do not apply to administrative proceedings  
19 conducted under this section.

20 (c) An administrative penalty assessed under this section may  
21 not exceed \$25,000 per day for each violation. Each violation is a  
22 separate and distinct offense, and, if a violation continues from day  
23 to day, each day constitutes a separate violation. In determining the  
24 amount of a penalty assessed under this section, the department shall  
25 consider the effect of the violation on the public health or the  
26 environment, a prior history of violations, deterrence of future  
27 violations, and other factors that the department considers relevant.

28 (d) At the time the department assesses an administrative  
29 penalty under this section, the department shall issue an assessment

1 notice to the person against whom the penalty is assessed. An  
2 administrative penalty assessed under this section becomes final 30  
3 days after issuance of the assessment notice unless an administrative  
4 hearing is requested. Failure to request an administrative hearing  
5 within 30 days after issuance of the assessment notice constitutes a  
6 waiver of the right to an administrative hearing and to judicial  
7 review. The person requesting the administrative hearing has the  
8 burden of proof on all issues the person raises at the hearing.

9 (e) After the conclusion of the administrative hearing, the  
10 department may affirm, modify, or rescind the administrative penalty,  
11 and the administrative penalty is then considered final unless it is  
12 appealed to the court under this subsection. A person against whom an  
13 administrative penalty is assessed may obtain judicial review of the  
14 administrative penalty by filing a notice of appeal in the superior  
15 court within 30 days after the department's issuance of the  
16 administrative hearing decision. The court may set aside the  
17 administrative penalty only if the administrative record, taken as a  
18 whole, does not contain a reasonable basis to support the finding of  
19 violation or the amount of penalty assessed by the department. This  
20 subsection provides the sole means for appealing an administrative  
21 penalty assessment. The validity, amount, and appropriateness of the  
22 administrative penalty are not subject to collateral judicial or  
23 administrative review.

24 (f) Action by the department under this section does not limit  
25 or otherwise affect the authority of the department to enforce a  
26 provision of this chapter, AS 46.04, or AS 46.09, or to recover  
27 damages, restoration expenses, investigation costs, court costs, and  
28 attorney fees. A person who pays an administrative penalty assessed  
29 under this section may set off the penalty amount paid against a civil

1 penalty subsequently assessed by a court against the person for the  
2 same violation under AS 46.03.758, 46.03.759, or 46.03.760(a).

3 (g) The assessment of an administrative penalty under this  
4 section does not affect the obligation of a person to comply with this  
5 chapter, AS 46.04, AS 46.09, or with a regulation, order of the  
6 department, permit, approval, or certificate issued under this  
7 chapter, AS 46.04 or AS 46.09.

8 (h) If a person fails to pay in full an administrative penalty  
9 assessed under this section at the time the penalty becomes final, or  
10 at the time a court, in an administrative appeal brought under this  
11 section, enters a final order in favor of the state, the attorney  
12 general may bring an action in superior court to collect the penalty.  
13 In such an action, the defendant is liable for

14 (1) the full amount of the administrative penalty assessed;

15 (2) interest from the date the department issued the  
16 assessment notice under (d) of this section;

17 (3) full reasonable attorney fees and costs incurred by the  
18 state in the collection action; and

19 (4) a nonpayment penalty of 20 percent of the assessed  
20 administrative penalty, for each quarter-year in which the assessment  
21 remains unpaid.

22 \* Sec. 5. AS 46.03.850 is repealed and reenacted to read:

23 Sec. 46.03.850. COMPLIANCE ORDER. (a) When, in the opinion of  
24 the department, a person is violating or is about to violate a  
25 provision of this chapter, AS 46.04, AS 46.09, or AS 03.05, or of a  
26 regulation, order of the department, permit, approval, or certificate  
27 issued under this chapter, AS 46.04, AS 46.09, or AS 03.05, or is  
28 otherwise endangering or creating the potential of pollution of the  
29 surface or subsurface air, land, or water within the jurisdiction of

1 the state, the department may issue a compliance order.

2 (b) The compliance order shall be personally served upon or sent  
3 by certified mail to the person affected. Service is complete on a  
4 corporation upon receipt by an officer of the corporation or by its  
5 registered agent, and on a partnership upon receipt by a partner. The  
6 compliance order is effective upon receipt. A request for an  
7 administrative hearing under (c) of this section does not act as a  
8 stay of the provisions or deadlines set out in the compliance order.

9 (c) The affected person may request an administrative hearing  
10 within 30 days after receipt of the compliance order. Failure to  
11 request a hearing within 30 days after receipt of the compliance order  
12 constitutes a waiver by the person of the right to an administrative  
13 hearing and to judicial review. Within 30 days after receipt of a  
14 request for an administrative hearing, the department shall decide  
15 whether to hold the hearing. If the department grants the hearing  
16 request, the department may limit the scope of the hearing to disputed  
17 issues of material fact.

18 (d) After the conclusion of the administrative hearing, the  
19 department may affirm, modify, or rescind the compliance order. The  
20 affected person may obtain judicial review of the compliance order by  
21 filing a notice of appeal in the superior court within 30 days after  
22 the department's issuance of the administrative hearing decision or  
23 its decision not to hold an administrative hearing. The court may set  
24 aside the compliance order only if the administrative record, taken as  
25 a whole, does not contain a reasonable basis to support the provisions  
26 of the compliance order or the department's decision to issue the  
27 compliance order. This subsection provides the sole means for  
28 obtaining judicial review of a compliance order. The compliance order  
29 is not subject to collateral judicial or administrative review.

1 (e) The provisions of AS 44.62 do not apply to administrative  
2 proceedings conducted or judicial review sought under this section.  
3 The person requesting the hearing has the burden of proof on all  
4 issues the person raises at the hearing.

5 (f) A compliance order issued under this section is an order of  
6 the department for purposes of this chapter, AS 46.04, AS 46.09, and  
7 AS 03.05.

8 (g) The attorney general may seek enforcement of a compliance  
9 order by bringing an action in superior court. In an action to  
10 enforce a compliance order, the attorney general may recover full  
11 reasonable attorney fees and costs incurred by the state in  
12 maintaining the action.

13 \* Sec. 6. AS 46.03 is amended by adding a new section to read:

14 Sec. 46.03.861. ENVIRONMENTAL AUDITS. (a) As part of a  
15 judicial or administrative enforcement action, the department may  
16 require a person to conduct an environmental audit and to prepare and  
17 submit to the department an environmental audit report.

18 (b) Each environmental audit shall be performed by a qualified  
19 independent contractor selected and hired by the person required to  
20 conduct the audit. The person's selection of the independent  
21 contractor is subject to the department's approval.

22 (c) In this section,

23 (1) "environmental audit" means a systematic, documented,  
24 periodic, and objective review of a person's operations, practices,  
25 and performance related to meeting all applicable environmental  
26 standards and requirements, including permit conditions;

27 (2) "environmental audit report" means a written report  
28 that candidly and thoroughly presents findings from a review,  
29 conducted as part of an environmental audit, of a person's

1 environmental operations, practices, and performance.

2 \* Sec. 7. AS 46.03.900 is amended by adding a new paragraph to read:

3 (35) "pervasively regulated facility" means a facility  
4 where activities or operations are or were conducted that affect a  
5 significant public interest and that are the subject of comprehensive  
6 regulation by the department.

7 \* Sec. 8. AS 46.03.761(h)(3), enacted by sec. 4 of this Act, and  
8 AS 46.03.850(g), enacted by sec. 5 of this Act, have the effect of amending  
9 Rule 82, Alaska Rules of Civil Procedure, by allowing the recovery of full  
10 reasonable attorney fees and costs in certain actions.

11 \* Sec. 9. This Act takes effect immediately under AS 01.10.070(c).

12

13